No. 14,799

In the

# United States Court of Appeals

*For the Ninth Circuit*

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GEORGE PEOPLES,
*Appellant,*

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
*Appellee.*

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## Brief for Appellee

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KOERNER, YOUNG, McCOLLOCH & DEZENDORF,
JOHN GORDON GEARIN,
800 Pacific Building,
Portland (4), Oregon

BURTON MASON,
W. A. GREGORY,
65 Market Street,
San Francisco 5, California

*Attorneys for Appellee*

Dated at San Francisco, November 8, 1955.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

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### APPELLEE'S STATEMENT OF THE CASE

This action was brought to recover damages for an alleged wrongful discharge of appellant, a trainman (brakeman) employed by appellee under a collective bargaining agreement. On March 7, 1955, a Pre-Trial Order was signed and filed (R. 4-37), showing without dispute the following: (1) appellant's employment was governed by the collective bargaining agreement between appellee and the Brotherhood of Railroad Trainmen, dated December 16, 1939, (hereinafter generally referred to as "the Agreement") (R. 5-15, 39, 43, 44); (2) appellant was absent from work from August 29 until November 24, 1952, when he was dismissed from the

service of appellee for violation of company rules prohibiting absence from duty without proper authority (R. 17, 18, 42); (3) Article 58 of the agreement entitled "Limitation in Presenting Grievances" prescribes the steps which must be taken, and the time limitations governing each step, if the employee desires to challenge any action taken by the employer (appellee) with respect to his employment (R. 13-15, 42); (4) in accordance with the requirements of Article 58(c), Item 2, (R. 13) and within the prescribed 90-day period next following November 24, 1952, appellant, through his union representative (R. 40; appellant's brief, page 10), on January 10, 1953, filed a written grievance with Superintendent L. P. Hopkins, contending that the dismissal was improper; (R. 19, 40, 43); (5) by letter of January 12, 1953, Superintendent Hopkins replied to the said letter of January 10, 1953, declining the grievance claim of appellant (R. 20, 40, 43) as provided in Article 58(c) Item 3 (R. 13); (6) Article 58, Section (c), Item 3, of the agreement provides that where a grievance claim has been declined by the Superintendent, the employee or his representative must within 90 days after the date of said decision give written advice to the Superintendent of his intention to appeal to a higher officer. This section continues: *"If such notice of appeal in writing is not given the Superintendent within the required 90-day limit, the claim will be deemed to have been abandoned."* (emphasis supplied) (R. 13, 39, 43); (7) no such written notice of appeal was given the Superintendent within the required 90-day period or at any time at all (R. 39, 43-44).

On the basis of the foregoing unchallenged facts appellee's Motion for Summary Judgment was granted. (R. 38-40) Findings of Fact, Conclusions of Law and Judgment in favor of appellee were made and entered by the court (R. 41-46).

A concurrent Motion for Summary Judgment filed by appellant was denied by the court (R. 38). That Motion was based upon the contention that because appellee allegedly dismissed appellant improperly and in violation of agreement provisions relating to investigation, he was excused from complying with the conditions set forth in Article 58 of the agreement (R. 27-28; appellant's brief, pages 46-48). However, Article 58 provides the sole, specific method in which any grievance or claim, whether or not related to alleged wrongful dismissal, must be processed (R. 13, 42-44).

In this state of the case the essential question now before this Court is whether the District Court erred in granting summary judgment on the basis of the record setting forth the above agreed facts. More specifically the questions presented by this appeal are as follows:

1. May an employee maintain an action at law against his employer, for alleged unlawful discharge in violation of a collective agreement, when it affirmatively appears that he has not complied nor attempted to comply with the express provisions of that agreement?

2. When the pertinent provisions of the agreement are clear and unambiguous, and there being no dispute as to any other material fact, did the lower court err in rendering a summary judgment?

3. Must an employee claiming unlawful discharge, in violation of the provisions of a collective bargaining agreement, comply with the procedural steps set forth in that agreement before he may bring either an action in court, or other proceedings of an administrative character, predicated upon his claim?

4. Where the undisputed facts show that appellant and his union representative were capable of filing the

required notice of appeal within the 90-day period and no facts are alleged to the contrary, is appellant excused from compliance with the contractual provisions which are, by their terms, conditions precedent to the bringing of a lawsuit?

5. Is the very discharge which is made the basis of the alleged grievance claim to be considered an excuse for the failure of appellant to handle such claim according to the clear provisions of the agreement?

## SUMMARY OF ARGUMENT

*A. The District Court did not err in holding that appellant's suit was wholly barred by reason of his failure to comply with the provisions of Article 58(c), Item 3, of the agreement relied on.*

The unchallenged facts show that appellant, in undertaking to proceed with his action, failed to comply with the essential conditions precedent to the assertion of the claim and the maintenance of the action.

*B. Appellant has not referred to any facts which would excuse him from compliance with the expressed provisions of Article 58. Instead he affirmatively waived any such contention by filing his grievance claim as provided in that article before he abandoned the balance of the requirements.*

Under Article 58, Section (c), Item 3, appellant was simply required to file a written notice of appeal with the Superintendent. No reason is shown which would excuse him from filing such notice.

*C. Summary judgment is the proper method of disposing of this case where there is no genuine issue as to any material facts.*

## ARGUMENT

**A. The District Court did not err in holding that appellant's suit was wholly barred by reason of his failure to comply with the provisions of Article 58(c), Item 3, of the agreement relied on.**

The unchallenged facts show that appellant, in undertaking to proceed with his action, failed to comply with the essential conditions precedent to the assertion of the claim and the maintenance of the action.

As disclosed by the Pre-Trial Order (R. 4-37) and by appellant in his brief (at page 2), this is an action to recover damages for alleged wrongful discharge, claimed to have been in violation of the collective bargaining agreement between appellee and its employees represented by the Brotherhood of Railroad Trainmen.

The facts stipulated in the Pre-Trial Order show beyond any question that (1) appellant was absent from work from August 29, 1952, until the date of his termination on November 24, 1952 (R. 17); (2) on November 6, 1952, appellee directed a letter to appellant, notifying him to appear on November 18, 1952, for investigation in view of the fact that company records indicated his absence from duty without authority commencing August 29, 1952 (the letter addressed to appellant was returned unclaimed) (R. 17); (3) a formal investigation was held as scheduled on November 18, 1952 (an accurate transcript of this investigation was made) (R. 17-18); (4) based upon the evidence developed in the said investigation, on November 24, 1952, plaintiff's service was terminated; he was so advised by United States

registered mail (the letter addressed to appellant was returned unclaimed) (R. 18); (5) on January 10, 1953, Mr. M. S. Felter, Secretary, Local 113, United Railroad Operating Crafts, plaintiff's authorized representative (appellant's brief, p. 10), filed a grievance with Superintendent L. P. Hopkins, seeking reinstatement with seniority unimpaired, and setting forth the facts on the basis of which he contended the company should reverse its position (R. 19-20); (6) by letter of January 12, 1953, Superintendent L. P. Hopkins replied to Mr. M. S. Felter's above letter, declining the said grievance claim (R. 20); (7) thereafter no notice of intention to appeal to a higher officer (referring to the Assistant General Manager of appellee, the highest officer designated to handle grievances on appeal) was given to the Superintendent in writing within 90 days next following the said Superintendent's declination on January 12, 1953, or at all; certain correspondence (R. 20-22) passed between Mr. Felter and Superintendent Hopkins from March 9 to March 19, 1953; this correspondence related to an attempt to arrange a conference; Mr. Felter did not show up at the appointed time; and on March 19, 1953, he wrote: "I wish to thank you for your consideration in trying to arrange an appointment, however, I find there is some more information which must be available before we could discuss the matter further. If this should appear advisable I will again contact you for an appointment." (R. 22); (8) no further correspondence passed between the parties to this action until approximately seven and a half months after January 12, 1953 (R. 2); (9) and although Article 58, Item 3, provides that *unless within 90 days from the date of the Superintendent's declination of the grievance claim (i.e., on January 12, 1953) the employee, or his representative, gives written notification to the Superintendent of his intention to appeal*

*to a higher officer "the claim will be deemed to have been abandoned"* (R. 13), neither the appellant nor his representative filed such notice within the 90-day period, or at any other time. There was thus a clear failure on the part of appellant to comply with the expressed terms of the contract upon which he relies.

Except where there is a contract limiting its common-law rights, a railroad employer, like any other, may discharge or discipline an employee at will. *Virginian Ry. v. Federation* (1937), 300 U.S. 515, 559; *Texas & N. O. R. Co. v. Ry. Clerks* (1930), 281 U.S. 548; *St. Louis B. & M. Ry. Co. v. Booker* (1928), 5 S.W.2d 856, cert. den. 279 U.S. 852. The Railway Labor Act does not abrogate an employer's right to hire or discharge employees, nor create any right of continued employment. *Texas & N. O. R. Co. v. Ry. Clerks, supra; Thomas v. New York Chicago & St. Louis R. Co.* (C.A. 6, 1950), 185 F.2d 614. Appellant's rights are, of course, measured by the collective bargaining agreement since his employment cannot be on any other terms. *J. I. Case Co. v. Labor Board* (1944), 321 U.S. 332, 334-336; *Telegraphers v. Ry. Express Agency* (1944), 321 U.S. 342, 346. In this action appellant is bound by all of the terms of the agreement duly entered into by the collective bargaining agent of all of the employees of the craft of trainmen. *Railway Labor Act,* 45 U.S.C., 151 et seq. (particularly Section 152); *Schlenk v. Lehigh Valley R. Co.* (1947), 74 F. Supp. 569, 571; *Elgin & E.R.Co. v. Burley* (1945), 325 U.S. 711, 739; *Elder v. New York Cent. R. Co.* (C.A. 6, 1945), 152 F.2d 361, 364; *Donovan v. Travers* (Mass., 1934), 188 N.E. 705, 707.

The law is well settled in this Circuit, particularly by the controlling decision of this Court in *Barker v. Southern Pac. Co.* (C.A. 9, 1954), 214 F.2d 918, that in these circumstances

appellant has no subsisting cause of action, and that if the essential facts are made to appear without challenge, a motion for summary judgment should be sustained.

In the *Barker* case, the employee had brought suit for damages for alleged wrongful discharge, in violation of the collective bargaining agreement applicable to his employment. Under that agreement a dismissed employee was required to present within ten days after dismissal a written request for a hearing; failing in which, as the agreement rule said, "the cause for action shall be deemed to have been abandoned". Summary judgment was rendered upon defendant's motion, and an undisputed showing that timely request for a hearing had not been made. Upon the employee's appeal, this Court said (214 F.2d, p. 919):

> "* * * The conditions required to be performed by appellant before he could claim breach by the other party were not fulfilled. Only if the company failed to accord to appellant the hearings provided after notice or by arbitrary disposal of his claim would there have been a breach of contract. *The exhaustion of the steps set out in the contract were a condition precedent to his cause of action.*" (Emphasis supplied.)

This same Article 58, Section (c), of the Trainmen's Agreement has been construed and applied by two United States District Courts in this Circuit. In *Wallace v. Southern Pac. Co.* (U.S.D.C., N.D. Cal. S.D., 1951), 106 F. Supp. 742, the Court referred to Article 58(c) of the agreement, and the interpretation thereof, and the failure of the employee plaintiff to comply with the requirements stated therein. In Conclusion of Law No. 4 the Court said (106 F. Supp., p. 745):

> "Compliance by plaintiff with the provisions of Article 58 (as modified by the Agreed-to Interpretation) of

> the applicable collective bargaining agreement was a condition precedent to the assertion by him of any claim or grievance arising from his dismissal on January 23, 1946, or from the proceedings leading thereto. Plaintiff having failed to comply with such provisions is barred from asserting any such grievance, i.e., claim that he was discharged in violation of the terms of the collective bargaining agreement; and any and all rights or claims which he may have had as a result of such dismissal expired and ceased to exist when he failed to comply with such provisions. Plaintiff's grievance was not presented within the time therein provided."

Another case, involving again Article 58 of the same agreement, was *Willman v. Southern Pac. Co.* (1948), U.S.D.C., N.D.Cal. N.D., No. 5937. In that case the Court, speaking through Judge Lemmon (now a member of this Court), rendered judgment for defendant, and adopted the following as its third conclusion of law:

> "3. Compliance by plaintiff with the provisions of Article 58 (as modified by the Agreed-to Interpretation) of the applicable collective bargaining agreement was a condition precedent to the assertion by him of any rights arising from his dismissal on June 21, 1946, or from the proceedings leading thereto. Plaintiff having failed to comply with such provisions is barred from asserting any grievance, i.e., claim that he was discharged in violation of the terms of the collective bargaining agreement, and any and all rights which he may have had as a result of such dismissal expired and ceased to exist when he failed to comply with such provisions. That plaintiff's grievance was not presented within the time therein provided."

It will be noted that the Court's conclusion in the later *Wallace* case was practically identical with the corresponding conclusion in the *Willman* case.

This failure to comply with agreement provisions was held to bar any recovery by a dismissed employee who had failed to present a grievance claim as required by the terms of the agreement by the United States Supreme Court in *Transcontinental Air v. Koppal,* 345 U.S. 653 (1953). The Court held at page 657 as follows:

> "Appellant in terms sues because of an alleged breach of this contract, and, to prevail, he must show that he has brought himself within its terms and has been unable to secure a satisfactory adjustment by the means therein expressly provided. *This he has failed to do, and for this reason he is unable to present his case in court as a justiciable controversy.*" (Emphasis supplied.)

Summary judgments in favor of appellee Southern Pacific Company have recently been rendered by the courts in the following cases involving the failure of dismissed employees to comply with substantially the same provisions as those which we are considering in collective bargaining agreements relative to other crafts of employees.

*Buberl v. Southern Pac. Co.* (U.S.D.C., N.D. Cal. SD-1950), 94 F. Supp. 11;

[Failure to present written grievance concerning dismissal within the time limit provided in the Yardmen's agreement]

*Lawrey v. Southern Pac. Co.,* U.S.D.C., Dist. of Oregon, Civ. No. 6451 (1953);

[Failure to file grievance in writing challenging dismissal within the time limit provided in agreement with Railway Patrolmen]

*Poe v. Southern Pac. Co.,* U.S.D.C., Nevada No. 1105 (1955);

[Failure to file grievance in writing challenging dismissal within the time limit provided in agreement with Locomotive Engineers]

*Barton v. Southern Pac. Co.,* U.S.D.C., Dist. of Oregon, Civ. No. 6693 (1954);

[Failure to file grievance in writing concerning dismissal within the time limit provided in agreement with Mechanical Crafts]

*Candia v. Southern Pac. Co.,* Dist. Court of the State of Utah, Second Jud. Dist., in and for the County of Weber, Case No. 28,203, Dept. No. 2 (1954);

[Failure to file grievance in writing challenging dismissal within the time limit provided in agreement with Mechanical Crafts]

In *Buberl v. Southern Pac. Co., supra,* defendant's Motion for Summary Judgment was granted for two reasons, one of which was stated by the Court as follows (94 F.Supp., p. 12):

"Judgment must also be for the defendant for another reason. The collective bargaining agreement, and the agreed interpretations thereof, which governed plaintiff's employment, *require employees who are dissatisfied with the decision of their Superintendent on any claim respecting employment to notify him of their intention to appeal to the General Manager or his representative.* This plaintiff failed to do." (Emphasis supplied.)

In the *Lawrey* case, the District Court for Oregon said:

"Plaintiff may not assert any rights under the contract between defendant and the Railway Patrolmen's Union when plaintiff has not complied with the time

limitation set forth in the grievance procedure of the contract."

In the *Poe* case, the District Court for Nevada entered summary judgment for the defendant, making findings as follows:

"7. No grievance or claim asserting that plaintiff's dismissal was improper, or in violation of the agreement aforesaid, or that plaintiff was not at fault in respect to said violations of rules and instructions, was filed by plaintiff in writing within the sixty days next following December 17, 1951, or at any other time, at all, as required by Article 25, Section 4(a) of the applicable agreement. Specific compliance with the successive steps set out in the agreement is an essential condition precedent to the prosecution of plaintiff's cause of action.

* * * * * * *

10. Plaintiff failed to institute any proceedings at all before the National Railroad Adjustment Board relating to or including the claim of agreement violation upon which this action is predicated. Plaintiff likewise failed to institute any action or proceeding based upon said claim of agreement violation, in any court or tribunal having jurisdiction, within six months next following either December 17, 1951, or December 5, 1952, or February 10, 1953, or at all until the filing of this action on August 25, 1953. Said claim, or any action based thereon, is and are wholly barred by virtue of the provisions of Article 25, Section 4(c) of said agreement."

Numerous other decisions on all fours with the instant case have been rendered by the courts holding that the causes of action were barred because of the failure of plaintiffs to comply with the expressed requirements of collective bargaining agreements.

*Atlantic Coast Line R. Co. v. Pope* (C.C.A. 4, 1941), 119 F.2d 39;

*Davis v. Union Pacific R.R. Co.* (U.S.D.C. Dist. of Nebraska, Omaha Div., Civ. No. 86-50-1952, 21 CCH Labor Cases, parag. 66,834);

*Taylor v. Southern Pac. Co.* (U.S.D.C. N.D. Cal. SD-1955, No. 31812 Civ.);

*Duminie v. Southern Pac. Co.* (U.S.D.C. N.D. Cal. SD-1953, No. 30483-Civ.);

*United R.R. Workers v. A. T. & S. F. Ry.* (U.S.D.C. Ill.-1950), 89 F. Supp. 666;

*Youmans v. Charleston & W. C. Ry. Co.* (1935), 175 S. Car. 99, 178 S.E. 671;

*McGlohn v. Gulf & S. I. R.R.* (1937), 179 Miss. 396, 174 So. 250;

*Division of Labor Law Enforcement, Dept. of Industrial Relations, State of California v. P.E. Ry. Co.* (1952), Superior Court of California, Appellate Dept., L.A. County, No. Civ. A-7962; 22 C.C.H. Lab. Cases, Parag. 67,244;

*Crow v. Southern Ry. Co.* (1942), 66 G.A. 608, 18 S.E. 2d 690;

*Hornsby v. Southern Ry. Co.* (1944), 70 Ga. A. 467, 28 S.E. 2d 542.

Appellant contends at page 20 of his brief that under Oregon law appellant was not required to exhaust the procedures provided in Article 58 of the agreement. He asserts that there is no Oregon decision on the issue in question and attempts to distinguish *Beck v. General Insurance Company* (1933), 141 Ore. 446, 18 P.2d 579 on the ground that it involved an enforceable time limitation in an insurance contract instead of a collective bargaining agreement. He also

asserts that the condition was one of a different character than that in Article 58, which is assertedly not made a condition to maintaining a civil action and in any event is an "arrangement for arbitration" which was unenforceable under Oregon law.

We submit that the Oregon law specifically requires a party seeking to recover upon a contract to show that he has complied with the conditions required of him to be performed. Thus contractual terms such as Article 58, Section (c), have been upheld restricting the time and manner in which one can enforce his rights under the contract in the absence of any proof that the provisions are arbitrary and unreasonable. *Beck v. General Insurance Company, supra; Egan v. Oakland Insurance Company* (1895), 290 Ore. 403, 42 Pac. 990; *Ausplund v. Aetna Indemnity Co.* (1905), 47 Ore. 10, 81 Pac. 577, 82 Pac. 12. In the *Ausplund* case the Court said in 81 Pac. 577, at page 581:

> "The parties to a contract may stipulate that an action for breach of an agreement must be brought within a certain period, and, if such limitation is reasonable, it will be upheld."

On the facts of this case the provisions of Article 58 are not unreasonable, and appellant does not contend otherwise. Furthermore, the Oregon law has been thus interpreted and applied by the United States District Court in two decisions to which we have already referred. In *Lawrey v. Southern Pac. Co.,* (U.S.D.C., Dist. of Ore., Civ. No. 6451-Jan. 24, 1953), and *Barton v. Southern Pac. Co.,* (U.S.D.C., Dist. of Ore., Civil No. 6693-Feb. 9, 1954), the Court granted summary judgments in favor of the defendants on the basis that the plaintiffs had failed to exhaust the grievance procedure and time limitations contained in the agreements between

Southern Pacific Company and its Railway Patrolmen and System Federation No. 114, respectively (R. 38-40).

Nor is there merit to appellant's suggestion that Article 58 does not create a condition to the maintenance of a civil action, intimating that these conditions apply solely to any recourse to the National Railroad Adjustment Board. Article 57 is entitled "Discipline-Investigations" and its contents refer to disciplinary action, including dismissal. Article 58, "Limitation in Presenting Grievances", provides a specific detailed procedure for the presentation and handling of grievances arising out of any alleged failure of appellee to comply with Article 57. Article 58, Section (c), Item 4, states: *"The above time limitations embodied in Items 2 and 3 shall also apply to disciplinary cases."* (Emphasis supplied.) Referring to the undisputed factual situation in this case (i.e., failure of appellant to advise the Superintendent in writing of his intention to appeal to higher officer from the Superintendent's declination of his grievance claim on January 12, 1953): *"If such notice of appeal in writing is not given the Superintendent within the required 90-day limit, the claim will be deemed to have been abandoned."* (Emphasis supplied.) These provisions unequivocally set forth conditions precedent to any claim by an employee that he was improperly dismissed. A.L.I. Restatement of the Law of Contracts, Sec. 259, Illus. 1. The question of construction of all written instruments is for the court. *Hamilton v. Liverpool, London & Globe Ins. Co.* (1890), 136 U.S. 242, 255; *Hughes v. Dundee Mtg. Co.* (1891), 140 U.S. 98, 104; *Insurance Co. v. Glidden* (1931), 284 U.S. 151, 157; *IX Wigmore on Evidence* (3rd Ed.) 552, parag. 2556; A.L.I. Restatement of the Law of Contracts, Sec. 235(e). The District Court in this case correctly construed the agreement according to its expressed terms (R.

38-40). The conditions set forth in Article 58 are substantially the same as those in *Transcontinental & Western Air v. Koppal* (1953), 345 U.S. 653, where the Supreme Court said at page 659:

> "It included provisions that no employee in respondent's status shall be discharged—
>
> 'without a fair hearing before a designated representative of the Company other than the one bringing complaint against the employee * * * At a reasonable time prior to the hearing, such employee and his duly authorized representative will be apprised, in writing, of the precise charge and given a reasonable opportunity to secure the presence of necessary witnesses. * * * A written decision will be issued within five (5) work days after the close of such hearing. If the decision is not satisfactory, then appeal may be made in accordance with the procedure prescribed in Step 3.'
>
> Step 3 provided for an appeal to the chief operating officer of the company. *Notice of intent to appeal must be in writing and made within ten work days after the above-mentioned decision which is part of Step 2.* If the decision in Step 3 is not satisfactory to the union, the matter then may be referred by the system general chairman, acting for the union, to the system board of adjustment, or, by mutual agreement, to arbitration." (Emphasis supplied.)

The conditions referred to above are also like those in the cases involving collective bargaining agreements which we have cited heretofore, and particularly the *Barker* case, supra, in which this Court said at page 919 (214 F.2d 919): "The conditions required to be performed by appellant before he could claim breach by the other party were not fulfilled * * *. The exhaustion of the steps set out in the contract were a condition precedent to his cause of action."

The *Barker* case likewise held at page 919 with regard to such grievance procedure: "It is our view that the filing of a request (under the contract) for a hearing, is intended to be a condition precedent to both procedures above referred to." (Application either to the National Railroad Adjustment Board or to the courts.) This view is clearly in accord with the holding in the *Koppal* case, supra. Finally, the difference between the procedure relating to the handling of grievance claims and arbitration is self-evident. The latter contemplates an agreement to submit a matter to the judgment of a designated third party or neutral for final determination. 6 Williston, Contracts (Rev. Ed. 1938), par. 1918. Arbitration has been criticized in some states as ousting the courts of their jurisdiction and restricting the parties from enforcing their rights under the contract by the usual legal proceedings in the ordinary tribunals. See *Rueda v. Union Pac. R. Co.* (1946), 180 Ore. 133, 175 P.2d 778. The contractual grievance procedure, in this case is simply a condition precedent to any recovery upon this contract, whether in proceedings which may ultimately be brought by the parties before the National Railroad Adjustment Board or in court. The required procedure is in no way similar to arbitration.

Appellant cites certain decisions which are said to hold that a discharged railroad employee may sue for damages for breach of his employment contract without having exhausted the grievance procedures provided therein. We have already referred to the recent Supreme Court decision in *Transcontinental & Western Air v. Koppal,* 345 U.S. 653 (1953), and *Barker v. Southern Pac. Co.* (1954), 214 F.2d 918, which hold that the administrative remedies in a railroad collective bargaining agreement must be exhausted before a dismissed employee may bring a justiciable claim

in court. The *Koppal* case affirmed the order of the District Court dismissing the complaint, while the *Barker* case affirmed a summary judgment in favor of the carrier-appellee and indicated that the question of exhaustion of administrative remedies may not be involved where the contractual condition precedent is unequivocally set forth. The contract in the *Barker* case provided in part, "* * *, otherwise the right to a hearing shall cease and the cause for action shall be deemed to have been abandoned." (214 F.2d 919). Similarly the contract in the case at bar reads, "If such notice of appeal in writing is not given the Superintendent within the required 90-day limit, the claim will be deemed to have been abandoned." (R. 13). By way of comparison it is interesting to note that the language in the agreement which the Supreme Court held to be a mandatory administrative procedure in the *Koppal* case, supra, reads, "If the decision is not satisfactory, then appeal *may be made* in accordance with the procedure prescribed in Step 3." (Emphasis supplied.) (345 U.S. 659) This language, which also appears in the opinion of the Court of Appeals (199 F.2d 122), was interpreted by the court as being conditional to the assertion of a justiciable claim in court. It was recognized that only after the employee had complied with these requirements could he effectively elect to assert a claim against the carrier for wrongful discharge (i.e., claim that he had been discharged in violation or breach of some provision of the contract), either seeking the remedy of reinstatement and pay for time lost before the National Railroad Adjustment Board or disavowing his employment relationship and seeking to recover damages in court for the same alleged breach of contract. Clearly the distinction in available remedies does not import a distinction in the

creation, limitation or accrual of the right upon which they are based. *Barker v. Southern Pac. Co.,* supra.

The cases cited by appellant at pages 32 and 33 of his brief are not applicable to the instant case. As pointed out in the *Koppal* case, supra (345 U.S. at page 661), the courts of Texas and Mississippi do not appear to apply the doctrine of exhaustion of administrative remedies which, as we have shown heretofore, is the generally applied rule. Nor do the decisions of those courts reach the question of expressed contractual conditions which are discussed in the *Barker* case, supra, and which are present in the instant case. Thus *Dufour v. Continental Southern Lines, Inc.* (Miss. 1953), 68 So.2d 489, and *Thompson, Trustee, St. Louis, Brownsville & Mexico Ry. Co. v. Moore* (C.A. 5, 1955), 223 F.2d 91, are not applicable here. The other cases cited by appellant were all decided prior to the Supreme Court's decision in the *Koppal* case (July 1, 1953). *Condol v. B. & O. R. Co.* (C.A.-D.C., 1952), 199 F.2d 400, and *Gould v. L. & O. R. Co.,* 203 F.2d 238 (C.A. 5, 1953), were decided solely on the point that each action was barred by the applicable statute of limitations.

**B. Appellant has not referred to any facts which would excuse him from compliance with the expressed provisions of Article 58. Instead, he affirmatively waived any such contention by filing his grievance claim as provided in that article before he abandoned the balance of the requirements.**

Under Article 58, Section (c), Item 3, appellant was simply required to file a written notice of appeal with the superintendent. No reason is shown which would excuse him from filing such notice.

The same provisions of Article 58, Section (c), of the agreement here involved (which governs the employment of

trainmen by appellee throughout its system) have been construed by the courts as conditions precedent to the assertion of any claim for wrongful discharge based upon the agreement. *Wallace v. Southern Pac. Company* and *Willman v. Southern Pac. Company,* both *supra.* Appellant asserts that he returned from his absence and reported for work on or about December 1, 1952 (R. 32), and learned that he had been removed from service (appellant's brief, page 8). Thereafter, as provided in Article 58, Section (c), Item 2, acting through his union representative, on January 10, 1953, he filed a written grievance claim with Superintendent L. P. Hopkins (R. 19, 40, 43). By letter of January 12, 1953, to appellant's representative, Superintendent Hopkins declined the said grievance claim (R. 20, 40, 43). At no time following this declination by the Superintendent did appellant carry out the next successive requirement of Article 58, Section (c), Item 3, that he must advise the Superintendent in writing of his intention to appeal to a higher officer. The agreement states that such failure shall result in abandonment of the claim (R. 13).

The specific provision in Article 58 which provides successive steps for handling of a grievance or claim (i.e., the contention that the agreement was improperly applied with respect to the employee), including the time limitation within which appeal to a higher company officer must be made, has two important purposes: (1) that the higher company officer should be given the opportunity to review the matter and correct any errors which may have been made at a lower level; and (2) to protect the parties to the agreement from the assertion of stale and vexatious grievances and claims.

Appellant's brief, at pp. 36, et seq., makes the contention that he did not receive notice of investigation, which was held on November 18, 1952, or of his dismissal within thirty

days after November 24, 1952, its effective date. This is said to constitute a breach of contract on the part of appellee and an excuse for the failure of appellant to follow the terms of Article 58. It is thus contended, on the one hand, that appellee breached the contract by failure to follow its terms in notifying, investigating and dismissing appellant, but, on the other hand, that the agreed means of reviewing and rectifying such erroneous action is not applicable. Clearly such a proposition is not consonant with a reasonable interpretation of the agreement. It is important to note that appellant has pointed to no fact of any nature which would excuse him from simply writing a letter to the Superintendent or notifying him of his intention to appeal if he was in fact dissatisfied with the Superintendent's action. Instead, appellant admits that as early as December 1, 1952, he appeared at appellee's office at Roseburg, Oregon, and was personally advised that he had been removed from service (R. 32). Thereafter, through Mr. M. S. Felter, his union representative (appellant's brief, p. 10), he recognized the applicability of the steps provided in Article 58 when he presented his alleged grievance claim relating to his dismissal to Superintendent L. P. Hopkins within the prescribed 90-day period (R. 13, 19). The said letter of January 10, 1953 (R. 19) was accepted by appellee as a presentation of appellant's grievance, as required by Article 58, Section (c) (R. 40). Appellant cannot avoid the fact that he thereby waived any excuse for not filing or further handling his alleged grievance claim. The fact that his claim was declined by Superintendent Hopkins on January 12, 1953, (R. 20) does not, of course, entitle appellant to brand the remaining steps of Article 58 either as "excused", "useless" or "futile". (Appellant's brief, page 42-44). As he himself says at page 43: "The most that can be said for use of the procedure is

that it would have given appellee, through its higher officials, the opportunity to correct any mistake made by the trainmaster." As we have stated heretofore, this is one of the important purposes of Article 58 of the contract. At page 44 appellant continues: "As it was, he was entirely justified in abandoning further the pursuit of a futile and useless appeal." It would appear that without basis in fact appellant would insist upon the benefits of the collective bargaining agreement and at the same time disavow its obligations.

Unless appellant relies upon Mr. Felter's letter of January 10, 1953, his claim would have been barred in the first instance by reason of his omission to comply with Article 58. *It is significant that Mr. Felter's said letter of January 10, 1953, (R. 19-20) does not assert or refer to any alleged defect on the part of appellee in either notifying, investigating or otherwise handling the dismissal of appellant.* No grievance was ever filed challenging the said action as being in any way inconsistent with the provisions of Article 57 until June 22, 1954, when the instant complaint was filed. Clearly any such contention on the part of appellant cannot, consistent with the provisions in the agreement upon which he relies or with the doctrine of laches, be made more than a year and a half following the date of such dismissal. Nor can such a contention be considered as an excuse on behalf of appellant for his complete failure to bring it to the attention of the specified officers of appellee in accordance with the administrative procedure set forth in Article 58. The agreement specifically provides that any such contention is deemed to have been abandoned.

In most of the cases which have been cited, the claim of alleged wrongful dismissal was coupled with a claim that the carrier had failed to accord a proper hearing or investigation under the agreement. Such claims include "failure

to permit the employee to have a representative of his own choice" (*Lawrey v. S. P. Co.,* supra) and "failure to give proper written notice or to confront the employee with the evidence against him" (*Wallace v. S. P. Co.,* and *Poe v. S. P. Co.,* both supra, *Transcontinental & Western Air v. Koppal,* 199 F.2d 117, 120-121, reversed and ordered dismissed in 345 U.S. 653, and the case at bar). Recent cases which have considered this matter uniformly hold that since any right to a hearing or investigation arises solely out of the agreement (and not out of statute), the existing contract controls. *Butler v. Thompson,* (C.A. 8, 1951), 192 F.2d 831; *Broady v. Illinois Central R. Co.* (C.A. 7, 1951), 191 F.2d 73, 76; *Brooks v. Chicago R.I. & P.R. Co.* (C.C.A. 8, 1949), 177 F.2d 385, 391. The Court of Appeals in *Butler v. Thompson* said, at page 833:

> "The statute recognizes a distinction between proceedings on the company level and those before the Adjustment Board when there is in effect a collective bargaining contract. In investigations, conferences or hearings by or before officers of the carrier an existing legal contract controls, whereas the procedure before the Board is controlled by the statute. In Brooks v. Chicago, R.I. & P.R. Co., 8 Cir., 177 F.2d 385, 391, this court after careful consideration said: 'The Railway Labor Act does not empower the courts to enforce against railroads any prescribed procedure for investigating and discharging its employees, * * *.' "

Obviously appellant, if he is to sustain a charge that the notice of investigation or the other investigation procedure was insufficient and constituted a breach of contract by appellee, he must show that he has presented these questions to his superiors as required by Article 58. Since he admittedly has not done this, the claim "is deemed to have been abandoned".

Appellant cites certain awards of the National Railroad Adjustment Board which are said to hold that where an employee has been disciplined without proper investigation he is relieved from compliance with the grievance procedure. No reference is made to the parties, the dates of the awards or the provisions of the contracts to which they refer. They clearly antedate the court decisions which we have cited hereinbefore. In its Decision No. 1499, dated March 21, 1955, Special Adjustment Board No. 18 (Train and Yard Service Panel), a board duly constituted under the terms of the Railway Labor Act to hear disputes on the property of appellee, affirmed the carrier's action in dismissing an employee for being absent without proper authority. A registered letter was addressed to the claimant at his last known address, which was returned with the notation "moved—left no address." The investigation upon which the dismissal was predicated was held in the absence of the claimant.

Appellant also cites *New Orleans Public Belt R. Com'n. v. Ward,* 195 F.2d 829 (C.A. 5, 1952), as holding that the employee involved must have been afforded an investigation in facts allegedly like those involved here. To the contrary, the *Ward* case held that Mrs. Ward had in fact appealed within the 30-day period specified in the supplemental agreement (page 831); and that in fact she had appealed to the management within the two-day period prescribed in Section VI, Rule 1(a), although the latter section was not applicable to her status as a laid-off (rather than dismissed) employee. It is self-evident that the question of exhaustion of administrative remedies under the contract was not involved, although the court expressly recognizes that it would have been enforced.

In *Barker v. Southern Pac. Co.*, 214 F.2d 918 (C.A. 9, 1954) plaintiff failed to ask for the hearing provided in Section 25(a) of the applicable agreement, contending that it was not necessary prior to recourse to the courts. The Court of Appeals for the Ninth Circuit affirmed the ruling of Judge Louis E. Goodman granting summary judgment in favor of defendant. Appellant attempts to distinguish the *Barker* case by saying that the agreement did not require a hearing before discharge. While a discharge under that agreement does occur before hearing, this point does not distinguish the case because under Rule 25 of the Dining Car Cooks and Waiters Agreement a timely request for a hearing in effect suspends the discharge and entitles the employee to a review by higher company officials. Appellant's brief (at page 35) cites a portion of the appellate court's opinion out of context. However, the inference attempted to be drawn therefrom is not accurate. Reference to page 919 of the opinion will show that the court was considering the fact that the contract was terminable for any cause satisfactory to appellee. In light of this, the court declared that the "failure to give notice in ten days did not cut off or destroy any existing right of action * * *" Then the court pointed out the only possible limitations on the right of the company to dismiss, i.e., failure to give notice, accord a hearing upon timely request or arbitrary disposal of Barker's claim, any of which would be considered a breach of contract on the part of the appellee. In respect to any such breach of contract the court said at page 919:

> "The conditions required to be performed by appellant *before he could claim breach by the other party* were not fulfilled. (Emphasis supplied.)
>
> * * * * * * *

"The exhaustion of the steps set out in the contract were a condition percedent to his cause of action."

Further the court said at page 920 that in the contract involved "* * * the request for a hearing has been made a condition percedent to the bringing of a law suit. *Wallace v. Southern Pac. Co.,* 106 F. Supp. 742 * * *" Reference to the provisions of the agreement there under consideration (page 919) shows that the same language was used in that contract as in the case at bar. There the contractual condition stated "otherwise the right to a hearing shall cease *and the cause for action shall be deemed to have been abandoned*". (Emphasis supplied.) In the case at bar the condition reads: "If such notice of appeal in writing is not given the Superintendent within the required 90-day limit, *the claim will be deemed to have been abandoned* * * *" (Emphasis supplied.) (R. 13)

As noted above, the Court of Appeals cited *Wallace v. Southern Pac. Co., supra,* also decided by Judge Goodman, which involved the identical Article 58(c) of the Trainmen's Agreement with which we are here concerned. There judgment was rendered in favor of defendant in a case on all fours with the instant case. Reference to the complaint in the *Wallace* case discloses that he alleged (pages 4 and 5):

"VI

"That the aforesaid discharge of plaintiff by defendant was unjust and in contravention of the aforesaid written contract of defendant and The Brotherhood of Railroad Trainmen in that:

"1. Plaintiff did not receive written notice of the formal investigation by defendant as to specific charge, time and place, sufficiently in advance to afford him the opportunity to arrange representation and for the attendance of desired witnesses.

"2. Plaintiff was not confronted with the evidence against him as required by the contract of employment.

"3. Plaintiff was not available for said investigation on account of sickness and injury, and that defendant had knowledge of said sickness and injury of plaintiff at the time it called said investigation."

In these respects the defendant was alleged to have violated Article 57 of the Trainmen's Agreement. It was contended throughout the trial that defendant had breached the contract and the plaintiff was excused from presenting a grievance as provided in Article 58. The Court said (106 F. Supp. 742, at page 75):

"Plaintiff having failed to comply with such provisions is barred from asserting any such grievance, i.e., claim that he was discharged in violation of the terms of the collective bargaining agreement; and any and all rights or claims which he may have had as a result of such dismissal expired and ceased to exist when he failed to comply with such provisions. Plaintiff's grievance was not presented within the time therein provided."

Neither the *Wallace* nor *Willman* cases, supra, can be distinguished from the instant case in this rationale in the application and interpretation of this agreement.

In *Transcontinental & Western Air v. Koppal,* supra, the Supreme Court, reversing the decision of the Court of Appeals in 199 F.2d 117, held that in an action for wrongful discharge predicated upon a collective bargaining agreement, the employee must show compliance with the terms of that agreement. The court accordingly held that since the law of Missouri required an employee to exhaust the administrative remedies under his employment contract, in order to sustain his cause of action, and it appeared that he had failed to do so, the judgment of the District Court

dismissing his complaint must be affirmed. Specifically, the Court said (345 U.S., p. 662):

> "* * * Here respondent [the employee] was employed by a carrier subject to * * * the Railway Labor Act, and his employment contract contained many administrative steps for his relief, all of which were consistent with that Act. Accordingly, while he was free to resort to the courts for relief, he was there required by the law of Missouri to show that he had exhausted the very administrative procedure contemplated by the Railway Labor Act. In the instant case, he was not able to do so and his complaint was properly dismissed."

In the *Koppal* case, as here, the employee claimed that he was dismissed " 'without a fair hearing' as expressly provided for in the agreement." In the opinion of the Court of Appeals, 199 F.2d 117, 120-121, the following appears:

> "Evidence is contained in the record from which it properly could be found as a fact that no other notice was given plaintiff of the hearing except the oral statement of the manager, after his interview with the two employees, fixing the second day following for an airing of the matter; that the hearing was set for the manager's office and no intention was expressed to have it held by some other officer—another officer being required under the contract only in relation to a discharge proceeding; that no suggestion was made to plaintiff that his job might be in jeopardy or that it would be advisable for him to have any witnesses present who could corroborate his story as to his illness; that the impression which plaintiff received from all the circumstances was simply that the session was to constitute a fuller airing of the situation, or, as he termed it, 'a scare session;' that he thus did not undertake to get the union or anyone else to represent him or to have witnesses present who, he claimed, could have substantiated the fact that he actually was ill and had not lied

about the reason for his absence; that, while a representative of the union appeared at the hearing, he did not attempt to confer with plaintiff or to advise him or intercede for him or to bring out his years of job service and previous record of satisfactory relationship; that the union representative's only interest throughout the course of the hearing seemed to be in the problem of absenteeism as it related to union members—of which plaintiff was not one—and the union's attempt to deal with it among its members; and that plaintiff had not realized, either before or through the hearing, that the matter of his discharge was being considered and thus was caught unawares when the hearing officer announced at the close of the hearing that he was persuaded from the evidence presented that plaintiff had been guilty of dishonest abuse of the sick-leave privileges and that he felt that plaintiff should be discharged."

The Court of Appeals reversed the action of the District Court in dismissing the complaint and taking away from the jury the questions of the adequacy of the hearing and correctness of the discharge. The Supreme Court thereafter reversed the judgment of the Court of Appeals and affirmed the action taken by the District Court, saying at page 662 (345 U.S. 662):

"Accordingly, while he was free to resort to the courts for relief, he was there required by the law of Missouri to show that he had exhausted the very administrative procedure contemplated by the Railway Labor Act. In the instant case, he was not able to do so and his complaint was properly dismissed."

**C. Summary judgment is the proper method of disposing of this case where there is no genuine issue as to any material facts.**

As shown herein, the stipulated facts set forth in the Pre-Trial Order (R. 4-37) disclose that appellant filed a

grievance claim challenging his dismissal as being a breach of contract and thereafter failed to comply with the successive steps required of him by the agreement.

This case is similar to *Gifford v. Travelers Protective Ass'n.,* 153 F.2d 209 (C.A. 9, 1946), and *Barker v. Southern Pac. Company,* 214 F.2d 918 (C.A. 9, 1954), which affirmed summary judgments under Rule 56(c) of the Federal Rules of Civil Procedure; also the *Buberl, Lawrey, Poe, Barton* and *Candia* cases, supra, all of which were decided on Motions for Summary Judgment, and *Transcontinental & Western Air v. Koppal,* 345 U.S. 653 (1953), where the court affirmed the dismissal of the case for lack of justiciability in facts parallel to those at bar.

## CONCLUSION

Article 58, Section (c), Item 3, of the collective bargaining contract upon which this action is predicated clearly places a condition upon the right of a discharged employee to make any further claim.

Having ignored the expressed terms of the agreement, appellant cannot avoid the agreed consequences that any further claim thereunder is abandoned and extinguished.

No genuine dispute exists as to any fact material to the disposition of this case. The judgment should be affirmed.

Respectfully submitted,

Koerner, Young, McColloch & Dezendorf,
John Gordon Gearin,
Burton Mason,
W. A. Gregory,
*Attorneys for Appellee.*

Dated at San Francisco, November 8, 1955.